Bank Islam Malaysia Bhd v Gnasegar a/l G Vengadasamy

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-03(IM)(NCC)-79–11 OF 2020
YAACOB MD SAM, RAVINTHRAN AND LEE HENG CHEONG JJCA
13 OCTOBER 2022

Bankruptcy — Act of bankruptcy — Date of commission — Whether Insolvency Act 1967 ('the IA') and Insolvency Rules 2017 ('IR') did not provide method for calculating seven-day period under s 3(1)(i) of Insolvency Act to determine when act of bankruptcy occurred — Whether resort should be had to O 3 r 2(5) of Rules of Court 2012 ('the ROC') to determine how the seven-day period should be computed — Whether Interpretation Acts 1948 and 1967 should not be resorted to for that purpose since r 284 of IR specifically provided that the ROC should be applied in the event of a lacuna

The issue in this appeal was whether resort should be had to the Rules of Court 2012 ('the ROC') or to the Interpretation Acts 1948 and 1967 ('Act 388') to determine at what point of time an act of bankruptcy had been committed by a judgment debtor who was served with a bankruptcy notice ('BN') under the Insolvency Act 1967 (formerly known as the Bankruptcy Act 1967). Based on a judgment the appellant ('A') had obtained against the respondent ('R'), A filed a BN against R and served it on him by way of substituted service by having the same published in a newspaper. The advertisement stated that the BN would be deemed served on R seven days after the date of the publication. When R did not respond to the BN, A filed a creditor's petition ('CP') to declare him a bankrupt. On R's application, the High Court deputy registrar dismissed the CP (which decision was upheld by the High Court judge on appeal) on the ground that it was filed more than six months after R had committed an act of bankruptcy under the BN contrary to s 5(1)(c) of the Insolvency Act. Under s 3(1)(i) of the said Act, a debtor would commit an act of bankruptcy if he failed to comply with a BN within seven days after service on him of the BN if the service was effected in Malaysia. In computing both the date when the BN was deemed to have been served upon him as well as the date when he had committed an act of bankruptcy under the BN, R took into account four public holidays which occurred during the time periods concerned. Based on his computation, R successfully argued that the CP was filed more than six months after the act of bankruptcy was committed. The appellant, on the other hand, argued that public holidays should have been excluded in the computation thereby resulting in the CP being filed within time. The High Court judge rejected A's argument that the court should apply O 3 r 2(5) of the ROC which stated that when computing a period of seven days or less, the day before a weekly holiday or public holiday should be excluded. The judge ruled

A that the ROC should not be used because it was subsidiary legislation and instead she applied s 54(1)(d) of Act 388 to hold that if the period under consideration was more than six days, public holidays and weekly holidays should not be excluded from the computation.

B **Held**, unanimously allowing the appeal:

(1) The Insolvency Act 1967 and the Insolvency Rules 2017 (formerly the Bankruptcy Rules 1969) did not provide for the method of calculation of the seven-day period in s 3(1)(i) of the Insolvency Act. However, r 284 of the Insolvency Rules allowed the Rules of Court 2012 to be resorted to in C the event there was a lacuna. There was no dispute that a lacuna existed with regard to the computation of the seven-day period (see paras 9 & 16).

(2) The High Court judge applied Act 388 in preference to O 3 r 2(5) of the D ROC on the ground that the latter was subsidiary legislation. The issue was not whether subsidiary legislation like the ROC and the Insolvency Rules 2017 should give way to principal legislation. Rather, the issue at hand was the application of the maxim that a special provision of the law should be preferred over a general provision. Whilst Act 388 applied E generally to all laws, r 284 of the Insolvency Rules specially provided that the ROC should apply in the event of a lacuna. Therefore, O 3 r 2(5) of the ROC was the special law that had to be applied to determine when the act of bankruptcy occurred. It would be otherwise if r 284 had not made such a provision (see paras 14 & 19).

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[Bahasa Malaysia summary

Isu dalam rayuan ini adalah sama ada tindakan perlu mengikut Kaedah-Kaedah Mahkamah 2012 ('KKM') atau Akta Tafsiran 1948 dan 1967 ('Akta 388') untuk menentukan pada masa mana tindakan kebankrapan telah G dilakukan oleh penghutang penghakiman yang telah disampaikan dengan notis kebankrapan ('BN') di bawah Akta Insolvensi 1967 (dahulunya dikenali sebagai Akta Kebankrapan 1967). Berdasarkan penghakiman yang diperoleh oleh perayu ('A') terhadap responden ('R'), A memfailkan BN terhadap R dan menyampaikannya kepadanya dengan cara penyampaian gantian dengan H mengiklankan perkara yang sama dalam akhbar. Iklan tersebut menyatakan bahawa BN akan dianggap diserahkan kepada R tujuh hari selepas tarikh pengiklanan. Apabila R tidak menjawab BN, A memfailkan petisyen pemiutang ('CP') untuk mengisytiharkan beliau muflis. Atas permohonan R, timbalan pendaftar Mahkamah Tinggi menolak CP (keputusan yang I dikekalkan oleh hakim Mahkamah Tinggi semasa rayuan) atas alasan ia difailkan lebih enam bulan selepas R melakukan tindakan muflis di bawah BN bertentangan dengan s 5(1)(c) Akta Insolvensi. Di bawah s 3(1)(i) Akta tersebut, penghutang akan melakukan tindakan muflis jika beliau gagal mematuhi BN dalam tempoh tujuh hari selepas penyampaian BN kepadanya

jika penyampaian tersebut dilaksanakan di Malaysia. Dalam mengira kedua-dua tarikh BN dianggap telah disampaikan kepadanya serta tarikh beliau telah melakukan tindakan muflis di bawah BN, R mengambil kira empat hari kelepasan am yang berlaku dalam tempoh masa berkenaan. Berdasarkan pengiraannya, R berjaya menghujahkan bahawa CP telah difailkan lebih enam bulan selepas perbuatan kebankrapan dilakukan. Perayu, sebaliknya, berhujah bahawa cuti umum sepatutnya dikecualikan dalam pengiraan dan menyebabkan CP difailkan dalam masa yang ditetapkan. Hakim Mahkamah Tinggi menolak hujah A bahawa mahkamah harus menggunakan A 3 k 2(5) KKM yang menyatakan bahawa apabila mengira tempoh tujuh hari atau kurang, sehari sebelum cuti mingguan atau hari kelepasan am harus dikecualikan. Hakim memutuskan bahawa KKM tidak boleh digunakan kerana ia adalah perundangan subsidiari dan sebaliknya beliau menggunakan s 54(1)(d) Akta 388 untuk memutuskan bahawa jika tempoh yang dipertimbangkan adalah lebih daripada enam hari, cuti umum dan hari kelepasan mingguan hendaklah tidak dikecualikan daripada pengiraan.

Diputuskan, sebulat suara membenarkan rayuan:

(1) Akta Insolvensi 1967 dan Kaedah-Kaedah Insolvensi 2017 (dahulunya Kaedah-Kaedah Kebankrapan 1969) tidak memperuntukkan kaedah pengiraan tempoh tujuh hari dalam s 3(1)(i) Akta Insolvensi. Walau bagaimanapun, r 284 Kaedah-Kaedah Insolvensi membenarkan Kaedah-Kaedah Mahkamah 2012 untuk digunakan sekiranya terdapat lacuna (kelopongan). Tidak ada pertikaian bahawa kelopongan wujud berkaitan dengan pengiraan tempoh tujuh hari (lihat perenggan 9 & 16).

(2) Hakim Mahkamah Tinggi menggunapakai Akta 388 sebagai keutamaan kepada A 3 k 2(5) KKM atas alasan bahawa ianya adalah perundangan subsidiari. Isunya bukanlah sama ada perundangan subsidiari seperti KKM dan Peraturan Insolvensi 2017 harus memberi laluan kepada perundangan utama. Sebaliknya, isu yang dihadapi adalah penggunaan maksim bahawa peruntukan khas undang-undang harus diutamakan daripada peruntukan am. Walaupun Akta 388 terpakai secara amnya kepada semua undang-undang, k 284 Peraturan Insolvensi dengan syarat khas bahawa KKM harus terpakai sekiranya berlaku kelopongan. Oleh itu, A 3 k 2(5) KKM adalah undang-undang khas yang perlu digunakan untuk menentukan bila perbuatan kebankrapan berlaku. Sebaliknya jika k 284 tidak membuat peruntukan sedemikian (lihat perenggan 14 & 19).]

Cases referred to

Arab-Malaysian Bank Bhd v Marina bt Mohd Yusoff [1999] MLJU 400; [1999] 3 CLJ 633, HC (distd)

A *Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2005] 1 MLJ 759; [2004] 8 CLJ 82, HC (distd)
Credit Corporation Malaysia Bhd v Saraswathi Narayan & Ors [1999] MLJU 768; [1999] 7 CLJ 459, HC (distd)
OCBC Bank (M) Bhd v Tan Hui Min Elaine [2017] 1 LNS 2229, HC (distd)
B *Stephen Wong Leong Kiong v HSBC Bank Malaysia Berhad* [2005] MLJU 43; [2005] 5 CLJ 504, HC (folld)

Legislation referred to

C Bankruptcy Rules 1969 (repealed by Insolvency Rules 2017) r 276
Insolvency Act 1967 ss 3(1)(i), 5(1)(c)
Insolvency Rules 2017 rr 100(1), 284
Interpretation Acts 1948 and 1967 ss 54, 54(1)(d), 105(d)
Rules of Court 2012 O 3 r 2, 2(5)
D Rules of the High Court 1980 (repealed by Rules of Court 2012) O 3 r 2, 2(5)

Appeal from: *Gnasegar G Vengadasamy v Bank Islam Malaysia Berhad* [2020] MLJU 2664 (High Court, Penang)

E *Syed Fadzil bin Hashim Alhabshi (with Farah Diana bt Addrus) (Sidek Teoh Wong & Dennis) for the appellant.*
Ho Hon Keong (Ho & Ho) for the respondent.

Ravinthran JCA:

F INTRODUCTION

[1] In this bankruptcy matter, the appellant is the creditor, whereas the respondent is the debtor. The appeal is against the decision of the High Court that upheld the decision of the deputy registrar who struck out the creditor G petition on the ground that it was filed out of time. The issue of time was in respect of the expiry of the sixth-month time period within which the creditor petition should have been filed. The expiry of the said period, in turn, was dependent on the date of the act of bankruptcy which was the date of the commencement of the said six-month period. We shall first set out the H background facts before elaborating on the issue of computation of time.

BACKGROUND FACTS

[2] The appellant bank entered judgment against the respondent on I 9 August 2005. The judgment remained unexecuted for a long time. On 23 March 2017, the appellant obtained leave to execute it. The appellant filed a bankruptcy notice on the respondent on 13 July 2017. The bankruptcy notice was served via substituted service order by publication in the newspaper on 10 November 2017. The appellant only filed the creditor petition on 30

May 2018. The respondent filed a notice of intention to oppose the creditor's petition on 14 December 2018. When the petition came up for hearing on 25 November 2019, the deputy registrar of the High Court dismissed it on the sole ground that it was not presented within six months of the act of bankruptcy upon which it is grounded. The learned High Court judge affirmed the decision of the deputy registrar to dismiss the petition on the same ground.

ISSUES

[3] The High Court held that the creditor petition was not presented in compliance with the time stipulation in s 5(1)(c) of the Insolvency Act 1967 (Revised 1988) (formerly the Bankruptcy Act 1967). The provision reads as follows:

> (1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —
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> (c) the act of bankruptcy on which the petition is grounded has occurred *within six months before the presentation of the petition*; (Emphasis added.)

[4] The date upon which a creditor petition is presented must necessarily refer to the date of filing in court as r 100(1) of the Insolvency Rules 2017 reads as follows:

> 100(1) The petition shall be filed in the court in which it is to be presented.

[5] In the instant case, the creditor petition was filed in court on 30 May 2018. The argument of the counsel for the respondent is that on this date, more than six months had elapsed from the date of the act of bankruptcy. He argued that the date of the act of bankruptcy was 27 November 2017. His argument is based on the following reasoning. Section 3(1)(i) of the Insolvency Act 1967 provides that a debtor commits an act of bankruptcy if he does not comply with a bankruptcy notice 'within seven days after service of the notice in case the service is effected in Malaysia'.

[6] The substituted service order, which was advertised in the newspaper on 10 November 2017 stated it will be deemed good service after seven days. This means that the service was deemed effected on 17 November 2017. Two public holidays, ie Saturday and Sunday were included in this computation. In calculating seven days 'after service of notice', again two public holidays, ie Saturday and Sunday were also included. Therefore, it was argued that the bankruptcy notice period under s 3(1)(i) ended on 24 November 2017 with the effect that the act of bankruptcy was committed on 25 November 2017. As for the time for filing the creditor petition, it argued that the last date for the appellant to file the said creditors' petition is on 25 May 2018. Since the

creditor petition was filed on 30 May 2018 in the instant case, it was said to be out of time. The above argument was accepted by the High Court.

[7] On the other hand, the appellant's argument is that public holidays should not have been included or reckoned with the effect that the service of the bankruptcy notice and the act of bankruptcy would have occurred later. The bankruptcy notice would have been deemed served on 21 November 2017 and the act of bankruptcy would fall on 1 December 2017. In this computation, the six-month period within which the creditor petition must be presented would also lapse on a later date. The last date to file the creditor petition would be 1 June 2018. The creditor petition that was filed on 30 May 2018 would not run afoul of s 5(1)(c) of the Insolvency Act 1967 (Revised 1988).

[8] Thus, the sole issue in this appeal is whether the intervening public holidays and weekly holidays must be excluded in the calculation of the seven-day period after service of the bankruptcy notice for the purpose of determining the date of the act of bankruptcy.

DECISION

[9] The Insolvency Rules 2017 (formerly the Bankruptcy Rules 1969) or the Insolvency Act 1967 does not provide for the method of calculation of the seven-day period in s 3(1)(i) of the Insolvency Act 1967. However, r 284 of the Insolvency Rules (formerly r 276 of the Bankruptcy Rules) allows resort to the Rules of Court 2012 in the event of lacunae. Rule 284 reads as follows:

> 284 In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the Court 2012 shall apply, *mutatis mutandis*.

[10] Order 3 r 2 of the Rules of Court 2012 which makes provision for computation of time in respect of an act within a specified period, reads as follows.

> 2 Reckoning periods of time (O 3 r 2)
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> (1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.
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> (2) Where an act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
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> (3) Where an act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.

(4) Where an act is required to be done within a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include the day before the weekly holiday or public holiday, that day shall be excluded.

[11] In s 54(1)(d) of the Interpretation Act 1948 and 1967 (Consolidated and Revised 1989) Act 388 ('the Interpretation Act'), a similar provision is made for exclusion of a day if the last day of the period is a weekly holiday or a public holiday (the so-called excluded days). Section 54 reads as follows:

(1) In computing time for the purposes of any written law —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period *is a weekly holiday or a public holiday (referred to in this subsection as excluded days*) the period shall include the next following day which is not an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

(d) where any act or proceeding is directed or allowed to be done *or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.* (Emphasis added.)

[12] However, it must be noted that in s 54(1)(d) the exclusion of the said weekly public holidays or weekly holidays only applies if the relevant time period within which an act is directed to be done does not exceed six days. Section 105(d) of the same Act is in *pari materia* with s 54(1)(d) as well.

[13] The learned High Court judge had regard to s 105(d) but held that it does not apply to the instant case as the relevant time period to determine whether an act of bankruptcy has occurred is seven days after the service of the bankruptcy notice. Thus, it is not a period that is six days or less which can trigger the application of ss 54(1)(d) or 105(d). The learned High Court judge said as follows:

[26] Seksyen 105 (d), Akta Tafsiran 1948 dan 1967 dengan jelas menyatakan pengiraan masa adalah tidak termasuk cuti mingguan dan cuti am dan hanya terpakai bagi tempoh enam hari dan ke bawah. Maka dengan itu, cara pengiraan JC adalah tidak tepat dan pemfailan petisyen pemiutang oleh JC adalah di luar masa.

[14] The argument of the appellant that O 3 r 2(5) applies to a specified period of seven days or less (as opposed to six days) in respect of the exclusion of the weekly holiday or public holiday was not accepted by Her Ladyship, who said that it is subsidiary legislation. In saying that public holidays and weekly holidays are not excluded days under the Interpretation Act if the specified period is more than six days, Her Ladyship adopted the reasoning in the High Court cases of *Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2005] 1 MLJ 759; [2004] 8 CLJ 82, *Credit Corporation Malaysia Bhd v Saraswathi Narayan & Ors* [1999] 7 CLJ 459, *Arab-Malaysian Bank Bhd v Marina bt Mohd Yusoff* [1999] MLJU 400; [1999] 3 CLJ 633 and *OCBC Bank (M) Bhd v Tan Hui Min Elaine* [2017] 1 LNS 2229.

[15] We shall now briefly consider these cases. *Chiew Chiu Sing v Dato' Seri Tiong King Sing* was an election petition case. In that case, the High Court said that where there is a defined statutory period, it has to be strictly complied with and the Rules of Court 2012 cannot apply. The court cited *Credit Corporation Malaysia Bhd v Saraswathi Narayanan & Ors* where Abdul Hamid Mohamad J (as he then was) in hearing an injunction matter said the computation provided under O 3 r 2 only applies to matters that fall within the purview of the Rules of High Court and those outside are governed by s 54 of the Interpretation Act. In *Arab Malaysian Bank Bhd v Marina Mohd Yusoff*, Steve Shim J in hearing an application to set aside a judgment in default (as he then was) said that O 3 r 2 is only for the Rules of High Court. The above cases were cited and followed in *OCBC Bank (M) Bhd v Tan Hui Min Elaine* [2017] 1 LNS 2229 which dealt with an application to set aside an order for sale.

[16] In our opinion, none of the above-mentioned cases are directly on point in this case. We agree that O 3 r 2 is for the purpose of computing time stipulations under the Rules of Court 2012 itself. The issue in the instant case is about the determination of the date of the act of bankruptcy seven days after the date of the service of the bankruptcy notice. The Insolvency Act 1967 (Revised 1988) and the Insolvency Rules 2017 do not provide for time computation. However, as we mentioned earlier, r 284 of the Insolvency Rules specifically provides for the adoption of the Rules of Court 2012 in the event of a lacuna. There is no dispute that there is a lacuna with regard to the calculation of a time stipulation in the Insolvency Rules.

[17] In this regard, we are persuaded by the reasoning of the High Court in the case *Stephen Wong Leong Kiong v HSBC Bank Malaysia Berhad* [2005] MLJU 43; [2005] 5 CLJ 504 which addressed the issue of the date of the act of bankruptcy which is also the very same issue that has arisen here. Low Hop Hing J (as he then was) held that in view of the lacuna in respect of the method of time computation in the Bankruptcy Rules 1969, O 3 r 2(5) of the Rules of High Court applies. His Lordship said that O 3 r 2(5) excludes the day before

the weekly holiday and the weekly holiday or the public holiday. Low Hop Hing J said as follows, in respect of the rationale for excluding public and weekly holidays:

> The exclusion is intended to ensure that the reckoning of the short period of seven days or less would only include clear working or office days so that the aforesaid excluded days would not be reckonable days.

[18] Although, ss 54(1)(d) and 105(d) of the Interpretation Act were not discussed in the above judgment, we are of the view that in respect of the determination of the date of the act of bankruptcy, the reasoning of His Lordship is persuasive for the following reasons.

[19] We are mindful that the Interpretation Act is principal legislation and that the Insolvency Rules 2017 and Rules of Court 2012 are subsidiary legislation. However, the issue here is not whether subsidiary legislation should give way to principal legislation. Rather, the issue at hand is the application of the maxim that the special provision of the law is to be preferred to the general provision. Whilst, the Interpretation Act applies generally to all laws, r 284 of the Insolvency Rules 2017 has specially provided for the application of the Rules of Court 2012 in the event of a lacuna. Therefore, O 3 r 2(5) Rules of Court 2012 which provides for time computation has become a special law for the purpose of determination of the act of bankruptcy. It would be otherwise if r 284 did not make such a provision.

[20] If the argument that principal legislation should override subsidiary legislation is accepted regardless of the legal maxim that a general provision of the law should yield to a special provision of the law, it can also be argued with equal force that even in the conduct of general civil litigation, s 54 of the Interpretation Act would apply and that public holidays will be excluded if the specified period is six days or less. This would render otiose O 3 r 2 and other provisions in the Rules of Court 2012 that are not consonant with the Interpretation Act although they are special provisions for the purpose of civil procedure.

CONCLUSION

[21] For all the above reasons, our view is that the applicable provision in respect of computation of time to determine the date of the act of bankruptcy is O 3 r 2 Rules of Court 2012. We therefore find merit in this appeal and allow it with costs in the sum of RM10,000 here and below subject to payment of allocatur.

A *Appeal allowed.*

Reported by Ashok Kumar

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